

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

PHILLIP GAY, #109431

Petitioner,

vs.

RALPH HOOKS, Warden, et al:

Respondent(s).

RECEIVED

CASE NO.: 2008UCV2864AWHA 44

DEBRA P. HACKETT, CLERK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

PETITIONER'S OBJECTION(S) TO
MAGISTRATE JUDGE'S RECOMMENDATION

Comes now the Petitioner, Phillip Gay, pro se and enters his Objection(s) to the Magistrate-Judge's Recommendation(s), dated July 16, 2008, in the above-styled cause; and in support thereof states the following:

1. The petitioner claim(s) presented in the 28 USC §2254 habeas corpus petition, alleging "that, He has been improperly and arbitrarily denied relief from the Life without Parole sentence under §13A-5-9.1 of Ala.Crim.Code(Acts 2001)", clearly presents a claim based upon the Fourteenth Amendment's Due Process and Equal Protection of Law. (Magistrate-Judge's Report, pp. 2-6; hereafter referred to as "MJR"). The State Court Judge's interpretation of §13A-5-9.1, in denying the petitioner's motion for reconsideration of sentence, is arbitrary to clearly established State law, as decided in Kirby v. State, 899 So.2d 968(Ala.2004). In, Holt v. State, CR-04-1250, (Ala.Crim.App., December 23, 2005), 2005 WL 3507967, the Alabama Court of Criminal Appeals held: " The fact that a crime is defined as a 'violent offense' under §13A-11-70 and/or §12-25-32,....., is not binding on a Circuit Court in determining whether an inmate is a 'non-violent convicted offender' within the language of §13A-5-9.1". Id.

The Court of Criminal Appeals further held" The fact that the inmate's underlying conviction was for an offense statutorily defined as a 'violent offense', does not preclude a Circuit Court from considering other factors presented to it, such as the facts and circumstances surrounding the underlying offense, the facts and circumstances surrounding the inmate's prior convictions, the inmate's prison record, and any 'other factors brought before the judge in the record of the case'." Id.

Note:

In the instant case, the "reviewing-judge" failed to require the District Attorney to respond to the proper motion for reconsideration of sentence and further failed to conduct and evidentiary hearing to determine the fact(s) surrounding the petitioner's case. Contra., Holt v. State, supra.

The petitioner's rights of Due Process was clearly violated by the "reviewing-judge's" summary dismissal of the proper §13A-5-9.1 motion. Accord, U.S. ex rel.-Arnold v. Illinois Prisoner Review Board(N.D.Ill.1992) 803 F.Supp.222,224-226.

(cont.)

2. The Magistrate-Judge, in his conclusion "that, the petitioner has not adequately presented an Equal Protection claim", has failed to require the Respondent(s) to respond to the 2254 habeas corpus petition. (MJR,pp.4-6). Had the Magistrate-Judge required the respondent(s) to respond to the petitioner's claim(s) for relief, the petitioner possessed sufficient evidence "in the form of record(s)" to support his Equal Protection Claim; where the State of Alabama has afforded relief to other inmate(s) under the exact same set of facts as which the reviewing-judge denied the petitioner's 13A-5-9.1 motion. (See: Petitioner's Exhibit A, attached).

As a matter of record, the State of Alabama does not "uniformly" deny the reduction of sentence(s) of Life without Parole and Release on Parole, to all prisoners convicted for violent-offenses and cannot justify the denial of the petitioner's 13A-5-9.1 motion for reconsideration of sentence. According, Moseley v. Klincar, 711 F.Supp.463,465(N.D.Ill.1989).

The petitioner sets forth specific facts to support his claim of violation of Equal Protection of Law. Moseley, supra.

WHEREFORE, premises considered, Petitioner moves the District Court to: 1) OVERRULE the Magistrate-Judge's Report and Recommendation for dismissal, 2) Issue Order "that further proceedings be conducted on the 2254 petition as required by law, and 3) Proceed to appoint counsel to represent the petitioner on the 2254 petition.

Submitted by:

Note:

Prepared with the assistance of layperson.



PHILLIP GAY

Petitioner Pro Se

AIS NO.: 109431

St. Clair Correctional Facility
1000 St. Clair Road
Springville, AL 35146-5582

Certificate of Service

I hereby certify that a copy of the foregoing has been served upon the Respondent(s), on this the 23rd day of July, 2008; by depositing in the United States Mail, postage prepaid, correctly addressed, to:

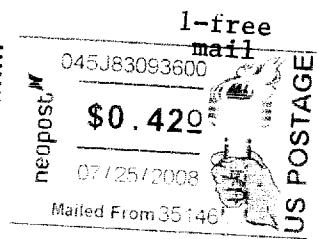
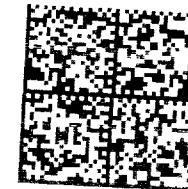
Troy King, Attorney General
Office of Attorney General
State of Alabama
Criminal Appeals Division
11 South Union Street
Montgomery, AL 36130-0152



PHILLIP GAY

Petitioner Pro Se

PHILLIP GAY # 109431
[J-16-2A]
1000 St. Clair Road
Springville, AL 35146-5582



CLERK, UNITED STATES DISTRICT COURT
Federal Courthouse [1:07-CV-164-WHA]
P.O. Box 711
Montgomery, AL 36101-0711

This correspondence is forwarded
to an Alabama State Fire Marshal who
has not been specifically requested to do so.
The Department of Corrections is advised
of the substance of this communication.

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Inmates That Have Received Sentence Reductions Under 13A-5-9.1
ExParte Kirby,

<u>Name</u>	<u>Conviction</u>	<u>County</u>	<u>Case No.</u>
1. Terry McLester	1 st Robbery	Houston	CC 81-881.61
2. Ronnie Wabbington	1 st Robbery	Jefferson	
3. Johnny Holley,Jr.	1 st Robbery	Tuscaloosa	CC 80-102.69
4. John Bratton	1 st Robbery	Tuscaloosa	CC 95-670
5. William Holt	1 st Robbery	Jackson	CC 87-443
6. James Hopson	1 st Robbery	Jefferson	CC 92-4936
7. Billy Helms	1 st Robbery	Houston	
8. Dwain Daniel	1 st Robbery	Jefferson	CC 94-3408
9. Alvin Daniels	1 st Robbery	Jefferson	CC 91-1817
10. Samuel Thompson	1 st Robbery	Jefferson	CC 84-1480
11. Larry Gardner	1 st Robbery	Autauga	CC 82-132
12. William Gates	1 st Robbery	Montgomery	
13. Willie Brewer	1 st Robbery	Houston	CC 86-696
14. Darren Caudle	1 st Robbery	Madison	CC 92-572
15. William Sanders	1 st Robbery	Jefferson	
16. Jeff Bell/Fawaad	1 st Robbery	Jefferson	
17. Jimmy Childers	1 st Burglary	Jefferson	CC 96-5183
18. Jerald Sanders	1 st Burglary	Mobile	CC 94-3224
19. Junior Kirby	1 st Trafficking	Jackson	CC 89-252
20. Rex Norris	1 st Trafficking	Jefferson	CC 93-786
21. Napoleon Mason	1 st Trafficking	Jefferson	
22. Donnie Phillips	1 st Trafficking	Jefferson	CC 99-625.61
23. Daryl Lewis	1 st Trafficking	Tuscaloosa	CC 99-62
24. Theon Williams	1 st Trafficking	Jefferson	
25. Darrell Wilson	1 st Trafficking	Jefferson	
26. William Bonner	1 st Trafficking	Tuscaloosa	CC 91-2048
27. Michael Peek	1 st Trafficking	Macon	CC 98-100
28. Raymond Smith	1 st Robbery	Houston	CC 91-314
29. Mabra Wright, Jr.	1 st Burglary/Sex. Abuse	Covington	CC 97-169
30. Vernon McElroy	1 st Trafficking	Etowah	CC 91-281
31. LaTerrance Williams	1 st Trafficking	Tuscaloosa	
32. Douglas Gray	1 st Trafficking	Morgan	
33. Richard Wiley	1 st Escape	Elmore	CC 95-278
34. Louis Johnson	1 st Robbery	Jefferson	CC81-682
35. Ontourus Porter	1 st Trafficking	Jefferson	CC98-4275
36. Willie Walker	1 st Robbery	Jefferson	CC86-1191
37. Harlin P. Seritt	1 st Robbery	Jefferson	CC80-1497
38. Willie Toyer	1 st Trafficking	Jefferson	CC97-5492

39. Stephen Shamburger	1 st Robbery	Jefferson	
40. Larry Hardy	1 st Robbery	Jefferson	
41. Anthony Sledge	1 st Robbery	Madison	CC93-0875
42. David Naismith	1 st Robbery	Houston	
43. Edward Earl Watts	1 st Burglary	Mobile	CC85-2312
44. Edward Penn	1 st Robbery	Jefferson	CC85-667
45. James Henry	1 st Robbery	Jefferson	CC92-4233
46. William Brown	1 st Robbery		
47. Rayford Rancher	1 st Robbery	Jefferson	
48. Dedrick Wright	1 st Trafficking	Jefferson	
49. James R. Edwards	Murder	Houston	CC82-85
50. Charles Woodson	Attempted Murder	Crenshaw	CC99-36&37
51. Ronald Box	1 st Trafficking	Jefferson	
52. Gates Pritchett	1 st Robbery	Jefferson	CC86-2463
53. Zonne Weaver	1 st Burglary	Mobile	
54. Derek Jenkins	1 st Robbery	Montgomery	
55. John Paul Rice	1 st Robbery	Baldwin	
56. Charles McComb	1 st Trafficking	Jefferson	
57. John Allen Bratton	1 st Robbery	Jefferson	CC95-670
58. Jerry Corbin	1 st Robbery	Jefferson	
59. Ernest Doster	1 st Robbery	Houston	CC94-140
60. Paul Staubs	1 st Robbery	Houston	
61. Bill Mardis	1 st Robbery	Montgomery	
62. Jimmy Burroughs	1 st Robbery	Marshall	CC89-048
63. Lacey Butler	1 st Rape & 1 st Robbery	Autauga	CC84-160
64. Anthony Heulett	1 st Rape & 1 st Sodomy	Madison	CC92-397
65. Kenneth Hayes	1 st Trafficking	Hamilton	CC97-122